No. 2932

United States
Circuit Court of Appeals
For the Ninth Circuit

WALTER B. MITCHELL,
Appellant,

vs.

THE LELAND COMPANY, a Corporation
FRANK LINN and THEODORE LELAND,
Appellees.

Reply Brief of Plaintiff in Error

Upon Appeal from the United States District Court for the District of Montana.

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Defendants' in Error.

Reply Brief of Plaintiff in Error

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Counsel for appellees says: "The action was tried as if it were an equitable action and *as though* upon the cause of action set out in the original complaint." Giving as authority for said statement (Trans., p. 58). But at that place it says: "The action was thereupon tried as if it were an equitable one and *on the cause of action* set out in the original

complaint plaintiff agreeing thereto", and evidently counsel misstated this intentionally in order to lay the foundation for the rest of the remarks he makes in his brief in regards to the unsupported allegations of the ammended answer herein. The abstract of the testimony, (Trans., p. 71), and decree of the trial court, (Trans., p. 58), shows that the cause of action was tried on the original bill of complaint and answer thereto and that is conclusive upon appeal of this cause, and it further shows that the appellees abandoned the said ammended answer and introduced no evidence to prove the allegations thereof and even objected to the introduction of the stock books in evidence to avoid the effect of the false allegations of the said ammended answer to-wit: (Trans., p. 17)

> "The said S. O. Leland was the owner of and entitled to the possession of the said certificate of stock and the shares of stock therein mentioned, and that on or about the said last-named date the said S. O. Leland procured from this defendant corporation the issuance of a certificate of stock for the said fifty shares of stock then owned by him in said corporation in liew of the certificate hereinabove mentioned, and thereafter on or about said last-named date sold, assigned and transferred the same to Theodore Leland, one of the defendants herein named, who is now and at all times since said last named date has been the owner of the said fifty shares of stock."

The stock books of the corporation showed that

there never was any such transaction and that no new certificate was authorized to be issued by the minutes of the meetings and stock books as well, (Trans., p. 75), and further the abstract of the testimoney shows no testimony of Theodore Leland as he was not even at the trial of said cause for he well knew the falsity of the said allegation and was afraid to be present, and thus this corporation took that means to first defeat the appellants cause and when the stock books were about to be introduced in evidence the said corporation objected, and the grounds of the court holding that they were inadmissable was that the defendants had abandoned their amended answer and therefore it was immaterial. Notwithstanding this and the fact that the appellees never made any amendments to the abstract of the testimony as certified to by the court he says:

> "The findings and decision of the trial court were made after hearing the testimony in full, the transcript showing only the barest syllabi of it." (Appellees Brief, p. 8).

and would thus insinuate that the abstract was not complete in substance, but the integrity of counsel in these statements is best observed from the fact that he stood by with knowledge of the appellants abstract testimony and allowed the trial court to certify the same without amendments and without

any complaint whatsoever so now he is foreclosed of any objection.

Counsel knowing that he could never prove the title of said certificate of stock to be in Theodore Leland's name, undertook upon the trial of said cause to impeach the Washington Judgment in order to defeat the appellants title by having S. O. Leland dispute the same and this is every bit of evidence that was introduced by them in any way on this subject. (Trans., p. 76).

> "The witness was then asked to explain what occurred between him and E. C. Murphy in reference to the return of the certificate and the preformance of the above mentioned contract." Plaintiff objected to any testimony on this subject for the reason that it was an attempt to impeach the judgment of the Superior Court of Spokane County, State of Washington, a court of record of that state, and not one of the issues raised by the pleadings, and for the further reason that the witness was personally served with process in said proceedings in Spokane, Washington, had his day in court and made no effort to appeal from said decision, and the time for appeal has since lapsed, and that witness would be estopped to introduce testimony to impeach said judgment; and for the further reason that the matter was fully adjucated and this testimony was immaterial and incompetent in this proceedings; and for the further reason that it was a total surprise to the plaintiff not having been plead in any way and would prohibit the plaintiff from rebutting the same".

The trial court over-ruled the objection and S. O. Leland testified in substance that he had completed his contract with Murphy and that Murphy had given the stock certificate to him without any written transfer and grabbed it back and counsel for appellees would now say to this court that such testimony could not impeach the judgement for it was only a money judgment, (Appellees Brief, p. 7), but in this as well as the other misrepresentations he makes he is wrong, for this testimony if true would have been a defense to the cause of action as tried in the Washington courts for if S. O. Leland had completed this contract he could have forced the transfer of the said certificate of stock to himself, and prohibited this judgment from being entered at all, and the very fact that he admits that he allowed the said suit to go by default and that he knew that the certificate was in possession of Murphy at the time of said suit, (Trans., p. 77), is sufficient to stamp his story now, when he knew that Murphy could not have been produced to contradict him upon the trial of this cause as absolutely false and unbelievable and especially so under the false allegation of the amended answer as set forth on first page herein, and not only false but absolutely inadmissable as it directly attacks the said Washington judgment collaterally and that was error of the trial court to allow the same to be done and to form his conclusions and base his decree upon the same.

The said S. O. Leland and Murphy had some confessed claims against each other and made a settlement of said claims by entering into a contract, agreeing to do certain things, providing the other done certain things and in case that each complied with the contract that it would be a final settlement between them, (Trans., pp. 53, 55), how does it then make a security contract or how could Leland claim it was trespass if E. C. Murphy handed him the certificate in question without any written transfer thereof, that would not constitute an assignment of the stock to him under the Statute of the State of Montana and the learned counsel recites authority on the 5th page of his brief which says the statute must be complied with to pass title, and this contract recites that certain expenses were to be paid by S. O. Leland in case certain things happened and left legitimate grounds for a dispute to arise over the amount to be paid and S. O. Leland admits that he refused to pay anything, so if there was a dispute arose, as claimed by S. O. Leland, and his testimony was even true on this matter, the mere fact that he was shown the certificate and had the same in his hand and he had gave a check for part of the amount claimed due and by reason of this dispute the whole proposed meeting and attempted consumation of the said contract was postponed and delayed and E. C. Murphy refused to transfer the said certificate to S. O. Leland, and S. O. Leland took back

his check, would that constitute a trespass or tortious act upon the part of E. C. Murphy and would that constitute a completment of said contract, of course not, it would leave the parties just as they stood before the attempted consumation, and under any circumstances the said S. O. Leland would have to litigate that question in the Washington suit as he could not now attempt to litigate it in the instance case.

> "The rule it that, in an action between the same parties, a judgment therein is res adjuducata as to all points in issue, and also all points which might have been raised and adjudicated". *Hawkins vs. Reber,* 81 Wash., 82, 142, Pac. 432.

And further S. O. Leland does not claim to own the said certificate now and the proof shows that the clai mof Theodore Leland is false and then what does the said corporation have to do with the title to said stock and right to refuse to transfer it to the appellant as it is not its duty to plead false defenses to defeat the issue of the certificate of stock in question to the appellant, of course none, whatsoever and the force of their argument therefore fails as it has no right to protect.

The contract of May, 1912, then was not a recission at all and S. O. Leland had sold this stock to E. C. Murphy on the6th of March, 1912, and delivered this certificate properly signed, transfering the

same to said E. C. Murphy, not as security, but as an absolute sale and transfer thereof and in the State of Washington and S. O. Leland then had no title, right or interest therein in any way to said certificate of stock from that time on, and the contract of May 1912, recites as follows: (Trans., p. 54): That E. C. Murphy

> "Agrees to transfer and deliver to the said party of the second part the fifty shares of stock in the said Leland Grocery Co., in consideration of which the second party does hereby agree", etc.

Now then, if S. O. Leland completed this contract as he says, he was entitled to have the said certificate transferred back, but if he did not, he was not entitled to the said certificate at all, no security at all, and no vested rights, and only the equitable right to inforce the said transfer of the certificate, providing, he should complete the contract and the courts of Washington obtained jurisdiction over him personally and had jurisdiction then over the subject matter of this Washington contract between E. C. Murphy and S. O. Leland and determined that S. O. Leland did not complete his contract and accordingly, if he did not, he was not entitled to the transfer of said stock and the court further ordered execution to issue to the Sheriff of Spokane County to seize and sell this equitable right that S. O. Leland possessed by reason of this contract of May

1912, and thereby the equitable interest of S. O. Leland was forever foreclosed and S. O. Leland says that he went away to California in the middle of May, 1913, and has resided there since, (Trans., p. 77), and if he had any defense whatsoever to the said action this man would never have left and allowed the Washington Court to do that, and the fact that he went to California and dismissed the matter from his mind, should convince this court of his lack of integrity in his statements now.

It therefore follows that this case does not resolve itself upon the question only of whether the purchaser at the so-called execution sale of the certificate at Spokane, obtained thereby ownership of the shares of stock in the defendant corporation represented by the certificate, for the title to said certificate of stock in question was always from the 6th of March, 1912, in the assignors of the appellant and the attempt of the said appellees to establish it in S. O. Leland or Theodore Leland, failed and appellant is not trying to prove his title by the weekness of appellant claim and therefore the cases cited by counsel, (Appellees Brief, p. 8), would be applyable to the appellees and the evidence by which the appellees attempted to prove their contention was wholly incompetent and immaterial and under the law cited in the opening brief of appellant, wholly inadmissable.

And even if it did, the cases cited by counsel for

appellees, (Appellees Brief, pp. 4, 7), have no application to the present case at all. Appellant does not dispute the fact of the powers of the State of Montana to regulate the manner in which its stock can be levied upon and that in case of such levy, of how it shall be done, but appellant does not conceed that the State of Montana has any power to direct a sister state how or in what manner that sister state shall levy execution and upon what property it can execute and therefore the citation referred to by counsel being applyable to domestic corporation would not apply to the instant case, and the same can be said of the other citation of authority for they deal with the question of attachment of the corperate stock of a corporation without having the certificate of stock and without obtaining jurisdiction over the corporation and there is no question that the situs of the stock of a corporation is at the domicile of the corporation for the purpose of inforcement of the liens of the corporation upon said stock and most states expressly provides in the statutes upon that subject that the stock is transferable by assignment subject to the liens of the said corporation thereon and so the Jellenik vs. Huron Etc., 177 U. S. 1, does not apply here, nor the Cotter vs. B. & R., etc., (Mont.), 77, Pac. 509, for these cases deal with the inforcement of the liens of a corporation in the former and the later the question of the issueing of the certificate originally, and since in the instant case there was no levy made on

the corporate stock, for the reason that the certificate of stock was within the State of Washington and held there by a resident owner and the said S. O. Leland being then resident also of the State of Washington and personal service was had upon him and the court thereby had jurisdiction over the person of the said S. O. Leland as well as the jurisdiction over the certificate itself by reason of the said levy made, and it was not neccessary to comply with the laws of the State of Montana and thus the laws of the State of Montana on the subject has no application to the instant case in that regard, and this court held in a very recent case Blake vs. Torman Bros. Banking Co., 218 Fed. 264, as follows:

> "Certificates of stock in corporations, properly indorsed and delivered as security to a trustee with power of sale in case of default in the trust agreement, are property, having the situs at the place of business of the trustee."

I nother words that the domicile of the owner of the certificates or trustee in charge thereof was the situs of the certificate. Counsels says that appellant cited no statute in the State of Washington authorizing the levy of execution upon shares of stock in a foreign corporation and appellant does not claim, that he has, but appellees conceed that the levy was duly and regularly made only disputes the fact that the certificates do not constitute

personal property, and the appellant cites the law of the state of Washington in regard to the levy upon personal property found within its borders and appellees conceed that, as they do not deny the same and therefore appellees cite the case of Danils vs. Gold Hill M. Co., 68 Pac., 884, as authority for the fact that stock in a corporation cannot be seized on execution and sold unless authorized by express statute and this case is on all fours with the case of Plimpton vs. Bigelow, 93 N. Y., 592 and the same principal is laid down in each case and the court determine that the foreign stock of a corporation cannot be attached by execution when the certificates themselves are not within the borders of the State wherein the levy is sought to be made, and the Supreme Court of the State of New York in passing upon a case where the certificate itself was within the state of a foreign corporation in the case of Simpson vs. Jersey City Contracting Co., 165 N. Y., 193, spoke as follows:

> "It was said that a share of capital stock represents an undivided interest in the whole of the corporate property, and the certificates of stock evidence the number of shares owned by the stockholder; that the right of a stockholder to share in the corporate property is a chose in action, which follows the shareholder's person; and that the property represented has its legal situs either at the domicial of the corporation or at that of the holder of the shares. It is difficult to see how that case, in defining the gen-

neral understanding of the law with respect to the ownership of shares of stock in a corporation can be said to be within the state for jurisdictional purposes through attachment proceedings, but whether the certificates of stock being here under a transfer by their owner to the trust company in pledge to secure an indebtedness of the former, there was not present property of the debtor which was capable of effectual seizure by the court's process.

But it is further argued in support of the proposition that the court was without jurisdiction that a judicial sale of the defendant's property or interests here would be ineffectual, because a transfer of the shares upon the corporate books could not be effectuated through any order of the court. The argument, again, rests upon Plimpton vs. Bigelow, where it was observed in the opinion that "it could scarcely be expected that the courts of another state would recognize a title to corporate stock in one of its own corporations, founded upon a sale under an attachment issued by our courts against a nonresident, when the only semblance of jurisdiction over the property was the service of notice in the attachment proceedings upon an officer or agent of the corporation here." The facts of that case, as I have already intimated, make it inapplicable here. It is an incorrect idea that the managing agents of the corporation or joint-stock company might have some discretionary authority to refuse a proposed transfer. Such a proposition is not sanctioned by the common law, and could not stand the test of reason. The presumption is that, if the stock of the defendant was sold at a judicial sale to another, the right of the purchaser to a transfer would be recognized, and his ownership of the stock be

given effect upon the books of the corporation. The managing agents of a corporation may prescribe reasonable rules and formalities regulating the transfer of shares, but they could have no discreationary power to refuse to register a proposed transfer. We are not to assume, in the event of a judicial sale of the defendant's interest in this stock for the purpose of applying upon the plaintiff's judgment any surplus remaining after satisfaction of the pledgee's demands, that it will be ineffectual to transfer to the purchaser a right to the ownership of the stock and to a transfer of the title upon the books of the corporation, as valid as though the trust company had sold it at a public sale, and delivered the certificates in its possession to a purchaser. The presumption with respect to the effect of a judicial sale of the stock is quite the other way from that which is suggested. It is not that our courts could effectuate a transfer of the stock upon the books of the foreign corporation, but that the corporation itself will recognize and give effect to the purchaser's title."

The Federal court said on this subject in the case of Merritt vs. Steel Barge Co., 79 Fed., 288, 234-236, as follows:

"It is contended, however, that this rule has no application to the stock of a foreign corporation, that stock certificates are mere evidence of the ownership of stock, and that the stock of a corporation can have no situs outside of the state in which the corporation was created. Speaking, technically, it is true that stock certificates is written evidence of a certain interest in corporate property. The same may be said

of notes and bills. They are simply evidence of indebtedness on the part of the individuals or corporations who issue them. But in the business world such obligations or securities are treated as somethoing more than mere muniments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property."

"In view of the foregoing consideration we are of the opinion that stock certificates are personal property within the purview of the foregoing statute, and that when such certificates are held in pledge, or as collateral, within the state, the court of that state have jurisdiction to establish the existance of a lien thereon, and to enforce the same by directing a sale of the property."

The Court of Nebraska said on this subject as follows in the case of Puget Sound Nat. Bank vs. Mather, 62 N. W., 396:

"Certificates of stock in a foreign corporation are personal property, and, when in the hands of third parties within this state, are subject to garnishment."

Therefore the cases cited in the opening brief of appellant are very much in point and the courts of Washington have never passed upon a case like the instant case and therefore the Daniels vs. Gold Hill M. Co. is not in point here, counsel further remarks that all the cases cited by appellant are cases where

the certificates were pledged as security or collateral or held under agreement for a lien thereon, but this court will see at a glance that this is not true as in the cases cited in the attachment has been made by the third party.

I will go still further. The Statute of the State of Montana provides that the stock of a corporation can be transferred as follows:

> "The delivery of a certificate of a corporation to a boni fida purchaser or pledgee for value together with a written transfer of the same or written power of attorney to sell, assign and transfer same signed by the owner of the certificate, shall be sufficient delivery to transfer the title as against the creditors of the transferrer and subsequent purchasers, but no such transfer shall effect the right of the corporation to pay any dividend due upon stock or to treat the holder as a holder in fact untill the same is transferred upon the books of the company or new certificate is issued to the person to whom it has been so transferred." (Section 3855, Rev. Code of Montana).

And therefore under this section of the Statute of Montana certificates of stock by proper indorsement can be assigned and the title thereto pass without the sanction of the corporation except the statute provides that the company can protect itself against suit for dividends untill the stock is transferred on the books, but it does not give the corporation any lien upon said stock and makes a certificate of stock in a Montana corporation then negotiable

and as such is the same as a promisary note and property within the meaning of the laws of Montana and can be passed as such.

Princeton Min. Co. vs. First Nat. Bank, 19 Pac., 210. (Montana case).

Since then the Statute of Montana provides that the certificates of stock in its corporation are personal property and can be sold at private sale by the owner thereof without the consent or any act of the corporation itself, the said corporation could not pass a by-law which would be contrary to this statute and therefore if the stock of a corporation can be sold and delivered at private sale by the delivery and written transfer of the certificate itself, there is no reason in the argument of counsel for appellees to the effect, that the said certificate is nothing but the evidence of the stock and amounts to nothing, and also if the said certificate can be sold at private sale it does represent property and can be sold at public sale as well, as long as the certificate is in the hands of the party authorized to make said public sale as cited by appellant in opening brief and especially is this true of a certificate in a Montana corporation as in the instant case, the certificate in question herein was properly indorsed to E. C. Murphy by S. O. Leland and properly transferred according to the Statute of Montana on the 6th day of March, 1912, when the sale of the same

occured and therefore the said S. O. Leland cannot claim any right, title or interest therein and if he cannot, the corporation clearly has no claim by statute or otherwise to reject the transfer of the said certificate to the appellant herein and in view of the attitude of the said appellees it seems that the appellant should be entitled to a money judgment in this case for the reason that the said corporation's action throughout this cause coupled with the testimony of the fact that they have not kept any books or made any record of the expense of running the business since the said certificate of stock was transferred to E. C. Murphy, (Trans., p. 72), that it is their intention to defeat the appellant and there never could be harmony to be associated with such persons, no doubt it will take a great deal of litigation yet to force the said corporation to account for the assets of the said corporation which have been wrongfully disposed of in order to defeat the appellants claims herein.

I respectfully submit that the judgment of the lower court should be reversed and the appellant be given the relief prayed for.

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